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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
PETITIONERS,

v.

ALLAN BAKKE,
RESPONDENT.

BRIEF OF NATIONAL ASSOCIATION OF AFFIRMATIVE ACTION OFFICERS, AMICI CURIAE

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Interest Of Amicus Curiae

This brief, submitted with the consent of all of the parties, is filed because the amicus has a vital interest in the outcome of this litigation. The National Association of Affirmative Action Officers (NAAAO) is filing this brief in support of the Regents.

The NAAAO is a four year old professional organization of minority affirmative action officers in institutions of higher education. NAAAO is an impecunious non-profit organization supported only by the dues of its members.

Issue

Under the Equal Protection Clause of the Fourteenth Amendment, the question is whether there was any evidence that the Regents' special admissions program represents purposeful or intentional racial discrimination against Caucasian applicants.

Argument

In *Arlington Heights* v. *Metro. Housing Corp.*, 50 L.Ed. 2d 450 (1977) (hereafter Arlington Heights), the Court applied to the Equal Protection Clause of the Fourteenth Amendment the test developed in *Washington* v. *Davis*, 426 U.S. 229, 48 L.Ed. 2d 597 (1976), which dealt primarily with the Due Process Clause of the Fifth Amendment. *Arlington Heights, supra*, held at 50 L.Ed. 2d 464 that

> "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

Subsequently, in *Arlington Heights, supra*, the Court continued at 50 L.Ed. 2d 465:

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

Arlington Heights, supra, was decided on Jan. 11, 1977, several months after the opinion of the California Supreme Court in *Bakke* v. *Regents*, 18 Cal. 3d 34, promulgated September 16, 1976. Accordingly neither the parties, the trial court nor the California Supreme Court had the opportunity to make the requisite sensitive inquiry into the available direct or circumstantial evidence of intent. No evidence on this issue was presented by either Mr. Bakke or the Regents.

Nothing in the deposition and declaration of George H. Lowrey, associate dean of student affairs and chairman of the admissions committee, supports an inference of invidious discriminatory purpose. There is nothing in the meager record from which it can be inferred that the special admissions program was instituted to invidiously discriminate against Caucasian applicants like Mr. Bakke.[1] Also, Mr. Bakke does not claim that in fact the program had such a differential impact.

The criteria used by the Regents in the admission process did not invidiously discriminate against Mr. Bakke because of his race. Further, there was no evidence that a racially discriminatory intent or purpose was a motivating factor for the creation and operation of the special admissions program. Consequently, the Regents' admissions procedure that excluded Mr. Bakke is not violative of the Equal Protection Clause of the Fourteenth Amendment.

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[1] In fact, the Caucasian race represented the largest number of applicants qualified for admission. More Mexican-American/Chicano applicants were admitted under the program than members of any other race. Mexican-Americans/Chicanos have traditionally been classified as Caucasians in California (*Perez* v. *Sharp*, 32 Cal. 2d 711, 713 (1948)). The California Supreme Court, like the special admissions program, failed to make a sufficiently clear and rational distinction between racial groups and ethnic groups. We respectfully submit that:

1) Socio-economic classifications are preferable to racial and ethnic ones as the basis of any special admissions program;

2) Socio-economic classifications should be combined with mandatory periodic reviews to ascertain the method used by any special admissions program to properly arrive at the lawful objective of adequate representation; and

3) Any special admissions program should be limited in duration of time until the lawful objective of adequate representation is reached.

Conclusion

The absence of any evidence that the special admissions program has a discriminatory intent or purpose against Caucasian applicants on the basis of race, precludes any finding that the Regents acted with a racially discriminatory intent or purpose as a motivating factor in establishing the special admissions program. In sum, neither the parties nor any California court had the benefit of the new test as now required by the intervening decision of Arlington Heights. The record is totally devoid of the requisite presentation and consideration of evidence on the crucial issue of the Regents' intent or purpose to racially discriminate against Mr. Bakke and other Caucasians. Therefore, we respectfully submit that the matter should be remanded.

Respectfully submitted,

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